(12)

No. 95-1738



In The

# Supreme Court of the United States

October Term, 1996

STATE OF ARKANSAS,

*Petitioner,*

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; AND DELTA PRODUCTION CREDIT ASSOCIATION,

*Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

## BRIEF FOR RESPONDENTS

RUFUS E. WOLFE
*Counsel of Record*
NICHOLS, WOLFE, LEDBETTER
& CAMPBELL, P.A.
1014 West Third
Little Rock, Arkansas 72201
(501) 372-5659

RICHARD A. HANSON
KEVIN J. FEELEY
MICHAEL B. FAYHEE
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606-5096
(312) 984-7799

*Attorneys for Respondents*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

47 pp

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued





TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued





TABLE OF AUTHORITIES – Continued



STATUTES:

TABLE OF AUTHORITIES – Continued





TABLE OF AUTHORITIES – Continued



ADDITIONAL STATUTORY PROVISIONS INVOLVED

**12 U.S.C. 2001(a).**

It is well declared to the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.

TABLE OF AUTHORITIES – Continued





## STATEMENT OF THE CASE

The following facts are submitted to supplement the Statements of the Case provided by Arkansas and the United States, as amicus in support of Arkansas.

Production Credit Associations are member institutions of the Farm Credit System; they may lend only to farmers and certain businesses which furnish farmers with services directly related to their on-farm operating needs. 12 U.S.C. 2075(a). In setting rates and charges, the Associations' objective is to provide credit "at the lowest reasonable cost on a sound business basis." 12 U.S.C. 2075(c)(2).

Because the Farm Credit System lends solely to the agricultural sector, the agricultural depression of the 1980's placed the System under severe financial stress. H.R. Rep. 425, 99th Cong., 1st Sess. 6-7 (1985). In the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 (1985), Congress gave the Treasury discretionary authority to provide financial aid to the System through the mechanism of the Federal Farm Credit System Capital Corporation. H.R. Rep. 425, *supra*, 28-29.

Continuing deterioration in the System's finances resulted in the enactment of the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1988). This Act committed up to $4,000,000,000 to support the System. Pub. L. No. 100-233, § 201, 101 Stat. 1597 (12 U.S.C. 2278b-6). Congress explained that this new federal assistance was required because other major agricultural lenders, life insurance companies and commercial banks, had either suspended or significantly cut back on their agricultural lending. S. Rep. No. 230, 100th Cong., 1st Sess. 14 (1987). Ultimately, $1,261,000,000 was provided to various Farm Credit System institutions through the Farm

Credit System Financial Assistance Corporation and Assistance Board which replaced the Farm Credit System Capital Corporation. 12 U.S.C. 2278a; *see* Federal Farm Credit Banks Funding Corporation, Annual Information Statement – 1990, at 4. The Financial Assistance Corporation issued bonds backed by the U.S. Treasury, the proceeds of which were used to purchase a special class of "Assistance Preferred Stock" in financially distressed Banks and Associations. 12 U.S.C. 2278b-7. The Farm Credit System Assistance Board certified institutions eligible to receive an equity infusion from the Financial Assistance Corporation. 12 U.S.C. 2278a-4. No financial assistance was received by the Associations which are parties to this suit.

## SUMMARY OF ARGUMENT

Congress designed the Farm Credit System to provide for the unique credit needs of America's farmers. It is a federally sponsored, federally supported, farmer-owned cooperative system which assists farmers in obtaining adequate and reliable credit at the lowest possible cost. 12 U.S.C. 2001(a). This is its sole function. Neither the Federal government, through direct lending, nor the private banking system can reliably perform this function. H.R. Rep. No. 171, 73d Cong., 1st Sess. 1-2 (1933) and S. Rep. No. 230, 100th Cong., 1st Sess. 14 (1987). In recognition of their governmental function, Congress has specifically designated the Production Credit Associations, and the other institutions of the Farm Credit System, as "Federally chartered instrumentalities of the United States." 12 U.S.C. 2071(a), 2071(b)(7) and 2077.



The Production Credit Associations have the mission of providing farmers with operational funding "at the lowest reasonable cost on a sound business basis." 12 U.S.C. 2075(c)(2). They are not operated for the profit of shareholders. The earnings of the Associations are returned to their member-borrowers as a means of reducing their borrowing costs. *Federal Land Bank of Wichita v. Board of County Comm'rs*, 368 U.S. 146, 151-152 (1961).

In the 1980's the agricultural sector entered into a severe depression. Because the Farm Credit System is, by Law, limited to lending to agriculture, the System incurred enormous losses, $4,600,000,000 in 1985 and 1986 alone. These losses substantially depleted the Farm Credit System's capital base and raised questions about its continued viability. H.R. Rep. No. 425, 99th Cong., 1st Sess. 6-7 (1985).

In response, Congress enacted a series of laws culminating in the authorization of up to $4,000,000,000 of new federal investment in the System. Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 201, 101 Stat. 1568, 1597 (1988) (12 U.S.C. 2278b-6). Congress authorized this investment because private creditors had again essentially withdrawn from lending to agriculture, and only the Farm Credit System could be relied upon to provide necessary credit in times of financial stress. S. Rep. No. 230, *supra*, at 14. In performing this function, the Farm Credit System acts as a fiscal arm of the federal government.

The Tax Injunction Act, 28 U.S.C. 1341, denies the district courts jurisdiction to enjoin the assessment or collection of state taxes. 28 U.S.C. 1341 does not restrict suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions.

*Department of Employment v. United States*, 385 U.S. 355 (1967).

The lower federal courts have understood *Department of Employment* to permit Federal instrumentalities, under certain circumstances, to sue on their own behalf in federal court to enjoin the imposition of unconstitutional state taxes. *See, e.g. Federal Reserve Bank of Boston v. Commissioner of Corps. & Taxation*, 499 F.2d 60 (1st Cir. 1974). These cases generally undertake an analysis:

> [i]n which each instrumentality must be examined in light of its governmental role and the wishes of Congress as expressed in relevant legislation.

*Federal Reserve Bank*, 499 F.2d at 64. If the instrumentality is asserting a sovereign governmental interest, Federal court jurisdiction is appropriate.

The United States, as an amicus in support of Arkansas, has endorsed this test in the present case. Brief for the United States as Amicus Curiae Supporting Petitioner, at 20 [hereinafter *Brief for the United States*]. The Production Credit Associations concur. The Production Credit Associations, and the other members of the Farm Credit System, may rightly claim a sufficient sovereign interest to permit them to sue on their own behalf.

Production Credit Associations are repeatedly designated by Congress as "Federally chartered instrumentalities of the United States"; the Associations perform a governmental role which Congress deems essential; Congress has repeatedly provided funding to the System in times of stress and implicitly guarantees Farm Credit System debt; and the federal government exercises pervasive



regulatory authority over the System. 12 C.F.R. § 600.1, *et seq*. Consequently, the Production Credit Association should be permitted to maintain this action.

The Court should not adopt a rule that the United States must be a party in all cases in which instrumentalities seek to challenge unconstitutional state taxes. The decision by the United States to participate in a particular suit will necessarily be influenced by the view of the Justice Department, an agency of the Executive Branch, regarding the merits of the instrumentality's claim. If the United States refuses to join the instrumentality in invoking federal court jurisdiction, state courts may infer that the instrumentality does not perform an essential governmental role, or that the United States is not persuaded of the instrumentality's claim of tax exemption.

The importance of the Federal instrumentality's federal function and the merits of its immunity claim are issues for Congress and the courts. To the extent the United States wishes to participate in deciding these questions, it should do so, not as a gatekeeper which can bar Federal instrumentalities from suing in federal court, but as an amicus providing the Executive Branch's unique perspective on these questions.

When Congress created the Production Credit Associations, it enacted a conditional waiver of state tax immunity under which the Production Credit Associations would lose their immunity when all federal investment was retired. Farm Credit Act of 1933, ch. 99, § 63, 48 Stat. 257, 267 (1933). In 1985, Congress repealed this conditional waiver. Farm Credit Amendments Act of 1985, Pub. L. 99-205, § 205, 99 Stat. 1678, 1705 (1985).

Under the rule of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), a Federal instrumentality is immune from state tax unless Congress has expressly waived that immunity. The current statute, and particularly 12 U.S.C. 2077, does not waive the Associations' immunity, expressly or otherwise. The various canons of statutory construction offered by Arkansas and its amici do not support a contrary conclusion. Congress authorized new federal investment in the Farm Credit System in 1985. In light of this renewed investment, to be made through a centralized mechanism rather than directly in the Associations, it is reasonable to conclude that Congress intended to repeal the prior conditional waiver of state tax immunity.

## ARGUMENT

The district court's jurisdiction to hear this case, and the Production Credit Associations' immunity from state taxation, both derive from the fact that the Associations perform an essential governmental function – providing needed credit to American farmers. The first section of this brief reviews the development of the Farm Credit System, the governmental function Congress designed the System to perform, and prior judicial recognition of this governmental role. The remaining sections of the brief consider the jurisdiction and tax immunity issues presented in this case in light of the governmental role played by the Associations and the Farm Credit System.



### I. THE PRODUCTION CREDIT ASSOCIATIONS WERE SPECIFICALLY CREATED BY CONGRESS TO PERFORM THE IMPORTANT GOVERNMENTAL FUNCTION OF PROVIDING CREDIT TO FARMERS

Section 1 of the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 (1971), as amended (12 U.S.C. 2001 *et seq.*), states:

> It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.

12 U.S.C. 2001(a). The institutions of the Farm Credit System have been designed to satisfy the unique credit needs, and certain closely related services, of farmers. This is their only function. *See, e.g.*, 12 U.S.C. 2075(a) (production credit associations authorized to provide short and intermediate-term loans to their farmer members).

In recognition of their role in fulfilling the policies and objectives of Congress, Production Credit Associations are expressly designated:

> Federally chartered instrumentalities of the United States.

12 U.S.C. 2071(a), 2071(b)(7), and 2077. The member institutions of the Farm Credit System are unique in being statutorily designated "Federal instrumentalities." This designation has not been given to any other entity created by Congress.

### A. The Farm Credit System Consists of Federally Sponsored and Supported, Farmer-Owned, Cooperative Institutions Created to Satisfy the Unique Credit Needs of Agricultural Borrowers

The first step in the creation of the modern Farm Credit System was the formation of the Federal Land Banks, pursuant to the Federal Farm Loan Act, ch. 245, 39 Stat. 360 (1916). The Senate Committee Report explained the need for institutions specifically created to provide farmers with mortgage loans. It was first concluded that commercial banks could not fulfill this role:

> National banks were encouraged to make personal loans to farmers for periods of six months, and were to a limited extent permitted to loan on improved farm lands for periods not exceeding five years; but your committee is convinced that loans must be made available to farmers on long-term mortgage security through some medium other than the commercial bank.

S. Rep. No. 144, 64th Cong., 1st Sess. 2-3 (1916). Congress also determined that time and savings deposits were not realistically available to fund farm mortgages, but that funds for long-term investment were available from other private sources. *Id.* at 3.



What was needed was a federal mechanism to connect long-term investors with the farmers. The Senate Report states:

> Of money seeking long-term investment at low rates there is an abundant supply. It includes the ordinary savings of the school-teacher, clerk, minister, and wage earner; the proceeds of life insurance in the hands of widows and other beneficiaries; funds belonging to estates, minors, and wards in chancery in the hands of executors, guardians, and trustees; funds of insurance companies, benevolent orders, and societies of various kinds; endowments of colleges, hospitals, museums, and other institutions; and assets to be invested by receivers, courts, and governments.
>
> * * *
>
> Here we discover the funds that should be made available to the farmer on long-term mortgage. We may picture the owners of this vast wealth grouped on one side of a river, the farmers desiring loans grouped on the other side. It is evident that each has what the other wants. We are asked to furnish the bridge which shall bring them in touch, or rather to grant a franchise to those who will build the bridge if we will construct the approaches. *Such we conceive to be a proper function of the Government.*

*Id.* (emphasis added). The Federal Land Banks thus created were federally sponsored, federally supported, farmer-owned cooperatives authorized to issue long-term bonds to obtain funds to make long-term loans to their farmer-members. The mortgages would in turn secure the

bonds. By securing the bonds by a pool of farm mortgages, long-term funds could be made available to farmers at the lowest possible cost. *Id.* at 4-5.

To further lower the cost of funds, Congress also designated the bonds issued by the Federal Land Banks as "Federal instrumentalities." While not constituting a statutory guarantee of payment by the federal government, this designation gives the bonds an implicit guarantee of federal support which permits the bonds to be issued at a "preferred" rate. Congress explained:

> System entities are not Government owned or controlled, however the System is a "Government sponsored entity" that affords it a preferred place in the Nation's money markets. System debt issuances however are not guaranteed by the Federal Government.

H.R. Rep. No. 295, 100th Cong. 1st Sess. 55 (1987).[1]

In 1933, Congress addressed the agricultural sector's need for shorter term operational financing. Congress concluded that this financing could not be provided by the federal government or by private lending institutions and again turned to the federally sponsored and supported, farmer-owned cooperative model to provide operational financing. The result was the creation of the Production Credit Associations, pursuant to the Farm Credit Act of 1933, ch. 98, § 20, 48 Stat. 257, 259 (1933).

---

[1] System banks currently issue notes and bonds on a consolidated basis with each bank jointly and severally liable for the obligations. They are still issued at a "preferred" rate. H.R. Rep. 295, *supra*, at 55.



Congress explained the need for the Production Credit Associations:

> The bill is designed to supply credit for agricultural production and marketing. It is supplementary to the land mortgage credit system provided for in the Federal Farm Loan Act.
>
> While direct lending by the Government to farmers to finance their production may be justified in cases of emergency, it is an unsatisfactory system of providing the required credit, for it is too expensive, it cannot be sufficiently flexible to meet local needs, and for other reasons is not a satisfactory method of furnishing essential credit. The other policy of permitting such lending to be done entirely by private agencies has been equally unsuccessful. Banks and other credit institutions in many instances have been either unable or unwilling to finance production and particularly in times of economic stress, many farmers in many localities have no possibility of obtaining loans for agricultural production. Such institutions as have been financing agricultural production have charged rates of interest which frequently make the farmer a perpetual debtor of his financing agency.
>
> The policy of this bill is to provide the stimulus in the form of Government capital and supervision to the establishment of local institutions in which farmers are participants and owners and through which necessary credit may be provided on a safe business basis and at reasonable cost.

H.R. Rep. No. 171, 73d Cong., 1st Sess. 1-2 (1933).[2] With the creation of the Production Credit Associations (and the Banks for Cooperatives to provide financing to agricultural cooperatives), the modern Farm Credit System was essentially complete.

One of Arkansas's amici describes the Production Credit Associations as "depression era" entities which are now simply private, profitable financing institutions. *Brief for Amici States of Ohio, et al.*, at 11. The description of the Associations as private, profitable financing institutions is wrong, but the reference to the Associations as "depression era" entities is more revealing than amicus recognizes.

After World War II, American agriculture and the institutions of the Farm Credit System enjoyed a long period of prosperity. As a consequence, the Production Credit Associations were able to retire all government capital by 1968. H.R. Rep. No. 593, 92d Cong., 1st Sess. 8 (1971). The 1980's were a different story.

Beginning in the early 1980's the agricultural sector entered a severe depression. Congress described the situation:

> The Nation's agriculture economy is in a depression. American farmers and ranchers today must cope with problems as severe as any their

---

[2] The Associations originally discounted the operating loans to their members with the then existing Federal Intermediate Credit Banks ("FICB's"). H.R. Rep. No. 171, *supra*, at 4. In 1988, the FICB's were merged with the Federal Land Banks to form the present Farm Credit Banks. *See* 12 U.S.C. 2011.



> industry has faced since the 1930's. Low commodity prices, high interest rates, expensive production costs, instability in the export market, and plummeting farmland values have made it impossible for tens of thousands of farm operators to service their debt loads.
>
> * * *
>
> It comes as no surprise, therefore, that agriculture-related businesses have become victims of the depression in Rural America in much the same way farm families have. Not the least of those related industries affected by the suffering rural economy is the agricultural lending sector. Because the banks and associations of the Farm Credit System are, by Law, single industry lenders to U.S. agriculture, it stands to reason that the System is under tremendous financial stress.

H.R. Rep. No. 425, 99th Cong., 1st Sess. 6-7 (1985). The Farm Credit System's initial response to the farm crisis was the implementation of various cooperative loss-sharing agreements and System assistance packages which made the resources of the entire System available to support the hardest hit Banks and Associations. *Id.* at 13. However, by 1985, these self-help programs had proven inadequate. *Id.*

Beginning in 1985, Congress enacted a series of legislative programs to reorganize and provide federal financial support to the Farm Credit System. The major enactments were the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 (1985); The Farm Credit Act Amendments of 1986, Pub. L. 99-509, 100 Stat.

1877 (1986); and the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1988).

The Farm Credit Amendments Act of 1985 had four primary goals: to provide statutory authority to make the System's entire resources available to shore up weakened Banks and Associations; to strengthen the Farm Credit Administration's regulatory authority and make it more of an independent regulator; to give discretionary authority to the Treasury to provide financial aid to the System; and to provide additional statutory protection to borrowers. H.R. Rep. No. 295, *supra*, at 55-56. This last goal was accomplished by authorizing comprehensive rules regulating the relationship between System institutions and their member-borrowers, particularly in the case of distressed loans and foreclosures. H.R. Rep. No. 425, *supra*, at 11-12.[3]

[3] Pursuant to the Farm Credit Act, the Farm Credit Administration has issued regulations on virtually every aspect of a Production Credit Association's business, including formation (12 C.F.R. § 611.1000), minimum loan-to-capital ratios (12 C.F.R. § 615.5200), territorial limitations (12 C.F.R. § 614.4070), accounting for troubled loans (12 C.F.R. § 621), the terms and conditions of loans (12 C.F.R. § 614.4200), the setting of interest rates (12 C.F.R. § 614.4270), lending limits (12 C.F.R. § 614.4351), borrower eligibility (12 C.F.R. § 613.3020) and termination or dissolution (12 C.F.R. § 611.1200-1270).

The pervasiveness of the regulatory regime is most striking in a Production Credit Association's dealings with distressed borrowers. *See* 12 U.S.C. 2199-2202e. For example, the Farm Credit Act prescribes several procedural prerequisites to a foreclosure action (12 U.S.C. 2202a) and provides an appeals process whereby a borrower can petition a credit review committee, consisting of fellow farmer-members, to review denials of restructuring applications (12 U.S.C. 2202). The special rights and privileges afforded distressed borrowers are in furtherance of the Congressionally mandated mission of the Production Credit Associations. *See* S. Rep. No. 230, *supra*, at 33-35 (describing how borrower rights provisions benefit the "family farmer").



Continuing deterioration in the Farm Credit System's finances resulted in the enactment of the Agricultural Credit Act of 1987.[4] This Act committed up to $4,000,000,000 of Treasury funds to support the System. Pub. L. No. 100-233, § 201, 101 Stat. 1597 (12 U.S.C. 2278b-6). Congress explained the need for federal support:

> Life insurance companies and commercial banks have also experienced [agricultural loan] losses comparable in percentage terms to those of the FCS but the diversified nature of their total loan portfolio limits the effect of these losses on their earnings and net worth. In response to these losses virtually all life insurance companies have suspended their farm loan programs. Similarly many commercial banks are unwilling to take on new customers and farm loan losses have resulted in a significant number of bank failures among small agricultural banks. *This contraction in the number of institutions willing to supply credit to farmers makes it even more important that the FCS remain a viable source of credit to agriculture during good times and bad.*

[4] The Farm Credit System institutions reported a total loss of ($4,600,000,000) in 1985 and 1986. H.R. Rep. No. 295, *supra*, at 57. This represented approximately forty percent (40%) of the total capital which the System had accumulated in the prior 70 years. *Id.*

S. Rep. No. 230, 100th Cong., 1st Sess. 14 (1987) (emphasis added).[5]

The agricultural depression of the 1980's is only the most recent demonstration of the recurring inability, or unwillingness, of private lenders to provide essential farm credit during hard times. It explains Congress's reaffirmation of the governmental function performed by the Farm Credit System – the provision of credit to agriculture in "good times and bad."

This Court has repeatedly recognized the essential role of the Farm Credit System in providing credit to the agricultural sector. In *Federal Land Bank of Columbia v. Gaines*, 290 U.S. 247 (1933), the Court stated:

> The Federal Farm Loan Act was adopted in response to a national demand that the federal government should set up a rural credit system by which credit, not adequately provided by commercial banks, should be extended to those engaged in agriculture, upon the security of farm mortgages.

290 U.S. at 250. In *Federal Land Bank of St. Louis v. Priddy*, 295 U.S. 229 (1935), the Court stated:

---

[5] Congress also provided cash payments under federal farm programs to assist the System's farmer-members in servicing their debt. The 1988 Annual Information Statement of the Farm Credit System states:

> Cash payments under U.S. Government farm programs played a major role in the increased ability of borrowers to continue in operation and to service their debts.

Federal Farm Credit Banks Funding Corporation, Annual Information Statement – 1988, at 6.



> Without now entering into a detailed examination of the subject, it is sufficient that this Court has already had occasion to consider the organization and functions of federal land banks, and to declare that they are instrumentalities of the federal government, engaged in the performance of an important governmental function.

295 U.S. at 231. *Accord, Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941), and *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 395 n.4 (1983) (describing the Farm Credit banks as "Federal instrumentalities designed to provide a reliable source of credit for agriculture").

This Court has not had occasion to consider the Federal instrumentality status of Production Credit Associations. The lower federal courts have concluded that the Associations are Federal instrumentalities. *See In re Sparkman*, 703 F.2d 1097 (9th Cir. 1983) (Production Credit Associations are Federal instrumentalities which partake of federal sovereignty and are thus immune from punitive damages). Decisions of the Eighth and Eleventh Circuit Courts of Appeal are in accord. *Schlake v. Beatrice Prod. Credit Ass'n*, 596 F.2d 278 (8th Cir. 1979); *Smith v. Russellville Prod. Credit Ass'n*, 777 F.2d 1544 (11th Cir. 1985).

### B. Farm Credit System Institutions are Not Profit-Making Organizations

Despite the consistent recognition and reaffirmation by Congress, this Court, and the lower Federal courts of

the unique governmental function performed by the institutions of the Farm Credit System, Arkansas and its amici allege that a Production Credit Association is:

> a federally chartered, privately owned entity that performs no governmental or regulatory function and exists to make profits for its members.

*Brief for the United States*, at 11. Arkansas and its amici err, both in refusing to admit the governmental role of Production Credit Associations, and in claiming that the members of the Farm Credit System exist to make profits for their members.[6]

By statute and regulation, Production Credit Associations operate in accordance with cooperative principles. 12 U.S.C. 2074; 12 U.S.C. 2154a(c)(1)(E); 12 C.F.R. § 615.5230. In setting rates and charges, they are obligated to provide credit

---

[6] Similar claims regarding the Federal Land Banks were rejected in *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 102-03 (1941). The same claims were made regarding the Second Bank of the United States, and rejected by Chief Justice Marshall in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 871 (1824). The Second Bank of the United States was, unlike the Production Credit Associations, operated for the profit of its private shareholders. *See Osborn*, 22 U.S. at 859-60, and *First Agricultural Nat'l Bank of Berkshire v. State Tax Comm'n*, 392 U.S. 339, 355 (1968) (dissenting opinion). Nonetheless, Chief Justice Marshall concluded:

> The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes.

*Osborn*, 22 U.S. at 860



"at the lowest reasonable cost on a sound business basis." 12 U.S.C. 2075(c)(2).

A member borrower must purchase stock in the Production Credit Association as a condition of obtaining a loan. *See* 12 U.S.C. 2154a(c)(1)(E). When a Production Credit Association distributes earnings to its members, 12 U.S.C. 2074, the purpose is not to distribute a profit on the farmers' mandatory capital investment. The purpose is to reduce the farmers' borrowing cost. The Court explained in *Federal Land Bank of Wichita v. Board of County Comm'rs*, 368 U.S. 146 (1961):

> The purpose of the Federal Farm Loan Act and its subsequent amendments was to provide loans for agricultural purposes at the lowest possible interest rates. One method of keeping the interest rate low was to authorize the federal land bank to make a profit to be distributed to the shareholders in the form of dividends. Because the associations of farmer-borrowers were required by law to be shareholders, the distribution of dividends effectively reduced the interest rates.

368 U.S. at 151-152. The distribution of earnings to reduce farmer-members' effective borrowing costs has been a part of the design of the Farm Credit System since the enactment of the Federal Farm Loan Act in 1916. *See* S. Rep. No. 144, *supra*, at 4-6; H.R. Rep. No. 643, 64th Cong., 1st Sess. 10 (1916).

In sum, the member institutions of the Farm Credit System are cooperative associations created to perform a single governmental function – the extension of affordable, secure and reliable credit to agricultural borrowers.

Congress has repeatedly recognized that this is a function which cannot be successfully performed directly by the federal government. It is a function which private lenders have either not been able, or willing, to perform. The function delegated to the Farm Credit System is, as declared by Congress in 1916: "a proper function of the Government." S. Rep. No. 144, *supra*, at 3.

## II. THE TAX INJUNCTION ACT DOES NOT BAR THIS SUIT BECAUSE THE ASSOCIATIONS ACT AS A FISCAL ARM OF THE GOVERNMENT

28 U.S.C. 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Despite the apparently absolute language of this jurisdictional bar, this Court held in *Department of Employment v. United States*, 385 U.S. 355 (1966):

> in accord with an unbroken line of authority and convincing evidence of legislative purpose, that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions.

385 U.S. at 358 (citations collected). The authorities cited by the Court explained that the primary purpose of the Tax Injunction Act was to prohibit multistate corporations from suing in federal court under diversity jurisdiction to enjoin state taxes. *See* S. Rep. No. 1035, 75th Cong., 1st



Sess. 2 (1937). These decisions also applied the established rule that a statute denying prior rights does not apply to the sovereign, unless explicitly stated. *See United States v. United Mine Workers*, 330 U.S. 258, 272 (1947). *See Brief for the United States*, at 14-15.

The lower Federal courts have interpreted *Department of Employment* to authorize Federal instrumentalities, under certain circumstances, to sue on their own behalf in federal court to enjoin the imposition of unconstitutional state taxes. *See Federal Reserve Bank of Boston v. Commissioner of Corps. & Taxation*, 499 F.2d 60 (1st Cir. 1974) (Federal Reserve Bank could sue in the absence of United States as co-plaintiff); *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991) (same for FDIC); *Simon v. Cebrick*, 53 F.3d 17 (3rd Cir. 1995) (same for FDIC). *Compare United States v. State Tax Commission*, 481 F.2d 963 (1st Cir. 1973) (Federal Savings and Loan Associations could not join suit to raise state law questions); *Federal Deposit Ins. Corp. v. State of New York*, 928 F.2d 56 (2d Cir. 1991) (FDIC could not bring suit on behalf of insolvent banks); and *Housing Auth. of Seattle v. Washington*, 629 F.2d 1307 (9th Cir. 1980) (local Housing Authorities could not bring suit in absence of United States). The issue in this case is whether Production Credit Associations perform a sufficiently important governmental role to permit them to bring suit in federal court to enjoin state taxes without the participation of the United States.

Initially, it seems surprising that Federal instrumentalities, whose constitutional exemption derives from the need to protect their governmental activities from state taxation, would be required by Congress to utilize the state courts to vindicate such federal rights, though,

of course, with an ultimate appeal to this Court.[7] This result seems particularly inappropriate in cases such as this which do not involve any questions of state law.

Arkansas and its amici admit that nothing in the legislative history of the Tax Injunction Act suggests any intention to deny Federal instrumentalities access to the federal courts. *Brief for Petitioner*, at 12; *Brief for the United States*, at 14. In *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), Chief Justice Marshall responded skeptically to the claim that the federal courts should not have jurisdiction to protect the immunity of the Second Bank of the United States from state taxation:

> The question, then, is whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws.

22 U.S. at 849. Chief Justice Marshall concluded that the federal courts were available to vindicate the Bank's immunity from state taxation. As a matter of policy, the same conclusion is appropriate here.

More recently, the Fifth Circuit Court of Appeals arrived at a similar conclusion regarding access to the federal courts in *Federal Deposit Ins. Corp. v. City of New*

---

[7] Certainly, the state courts can be expected to perform this function properly, and the Associations concede that Arkansas does provide a "plain, speedy and efficient" remedy to the resolution of tax disputes.



*Iberia*. Affirming the district court's holding that 12 U.S.C. 1341 was inapplicable to the FDIC's suit, the court stated:

> Section 1341 deprives federal courts of jurisdiction to enjoin, suspend or restrain the assessment, levy or collection of any tax under state law except where no plain, speedy and efficient remedy is available in state courts. While the goal of the statute is to reinforce federalism and comity with the states in matters of local taxation, that goal is not subserved when the local authorities have attempted to tax an instrumentality of the federal government.

*New Iberia*, 921 F.2d at 613.

It is also revealing that *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), a landmark of modern "Federal instrumentality" doctrine, was brought in federal court. The Tax Injunction Act was adopted in the same year in which this Court rendered its decision. While the statute might not have been applicable to that specific litigation, it is surprising that the Court did not even comment on the restriction on federal jurisdiction.[8]

The position of the United States in this case is also surprising. In *United States v. Michigan*, 851 F.2d 803 (6th

---

[8] One amicus claims that national banks have been denied the right to sue in federal court to enjoin state taxes under principles comparable to the Tax Injunction Act. *Brief for Amici States of Ohio, et al.*, at 12 (citing *Hammerstrom v. Toy Nat'l Bank of Sioux City*, 81 F.2d 628 (8th Cir.)), *cert. denied*, 299 U.S. 546 (1936). Amicus misreads *Hammerstrom*. The court held only that the banks were required to exhaust their state administrative remedies to obtain the requested refunds. The court specifically did not decide whether the banks could then sue in federal court. *Hammerstrom*, 81 F.2d at 636.

Cir. 1988), the United States invoked federal court jurisdiction on behalf of the Federal Credit Unions to contest unconstitutional state taxes. The United States drew an analogy between Federal Credit Unions and the institutions of the Farm Credit System to argue that the Federal Credit Unions were performing an important governmental function. *Id.* at 806.[9]

Given this history, and the repeated congressional and judicial recognition of the governmental role of the Farm Credit System, it is difficult to avoid the suspicion that the claim in this case that the interests of the United States are not sufficiently involved to justify Federal court jurisdiction is based primarily on the Justice Department's view on the merits that Congress has

---

[9] The Sixth Circuit Court of Appeals agreed:

> In *Federal Land Bank v. Bismarck Lumber Co.*, the Supreme Court held that a virtually-identical fiscal function was indicative of a tax-immune instrumentality status. The Court concluded that federal land banks were " 'instrumentalities, engaged in the performance of an important governmental function,' " 314 U.S. at 102, 62 S. Ct. at 5 (quoting *Federal Land Bank v. Priddy*, 295 U.S. 229, 231, 55 S. Ct. 705, 706, 79 L.Ed. 1408 (1935)), because "[t]hrough the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers." *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. at 102, 62 S. Ct. at 5. Thus, federal credit unions, which provide a similar public service to a broader cross-section of the nation's citizens, also perform an important governmental function.

*Michigan*, 851 F.2d at 806.



waived the Associations' constitutional immunity.[10] It is difficult to believe that the Justice Department would not join the Associations to invoke the aid of the federal courts if it agreed that the Production Credit Associations are immune from state tax.

### A. The Production Credit Associations Satisfy the Test Proffered by the United States for Invoking Federal Court Jurisdiction

In its brief to this Court at the Petition stage, the United States offered alternative tests for determining when a Federal instrumentality may invoke the "Federal instrumentality" exception to the Tax Injunction Act. *See Brief for the United States as Amicus Curiae* at 11-13. One test was whether the United States was a party to the suit. The other was whether the Federal instrumentality performed a function sufficiently governmental to dispense with the requirement that the United States be joined as a party.

In its brief on the merits, the United States now suggests that the Court need not decide whether the United States must be a party. *Brief for the United States*, at 20. Rather, the United States suggests that the Court should undertake an analysis in which each instrumentality must be examined in light of its governmental role to determine whether it can claim any sovereign

---

[10] Congress is certainly not disinterested in the work of the Farm Credit System, given that the System has been periodically supported by large capital infusions, by the implicit federal guarantee of System debt, and indirectly through farm programs which provide funds to permit farmers to service their loans.

governmental interest. *Id.* at 18-20. The Production Credit Associations willingly endorse the use of this test. They are sufficiently part of the sovereign to sue on their own behalf.

First, Congress has expressly and repeatedly acknowledged the status of the Associations as Federal instrumentalities. 12 U.S.C. 2071(a), 2071(b)(7) and 2077. Second, the Farm Credit System performs a role which Congress deems essential, 12 U.S.C. 2001(a), a role which Congress has determined that the federal government cannot effectively perform directly, and a role which cannot be reliably performed by private lenders. *See* S. Rep. No. 230, *supra*, at 14.[11] Third, Congress has repeatedly provided funding needed to maintain the System in times of stress and has implicitly guaranteed its debt. *See, supra*, p. 15. Fourth, the federal government exercises pervasive regulatory authority over the System, to a degree that detailed requirements have been imposed on dealings with member borrowers, from loan approval to foreclosure. *See supra*, p. 14, n. 3. These factors fully justify the conclusion that the Farm Credit System institutions perform a critical governmental role and are sufficiently integrated into the federal government to be entitled to

[11] The Farm Credit System is the largest source of credit to American agriculture. H.R. Rep. No. 425, *supra*, at 7. The provision of affordable, secure and reliable credit to almost 1,000,000 farmer members, H.R. Rep. No. 425, *supra*, at 6-7, is at least as important a fiscal function as that performed by the Federal Reserve Banks. Like the Federal Reserve Banks, the Farm Credit System acts as a fiscal agent of the federal government.



invoke federal court jurisdiction to protect their constitutional immunity from state taxation.[12]

In the end, the United States and Arkansas refuse to recognize the governmental role played by the Farm Credit System because they view the System as performing a "proprietary" rather than a governmental function. This is a false distinction. In *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), the Court stated:

> The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477. It also follows that, when Congress constitutionally creates a corporation through which

[12] The Associations admit that one factor which may support the conclusion that a particular Federal instrumentality may sue in federal court, without joinder of the United States, is the existence of a general statutory grant of federal jurisdiction for cases involving the instrumentality. *See, e.g. Federal Reserve Bank of Boston v. Commissioner of Corps. & Taxation*, 499 F.2d at 63. However, this does not appear to be viewed by the lower federal courts as a critical consideration. This Court's decision in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), is not to the contrary. While the Court found that the action in that case was not barred by the Tax Injunction Act because of 28 U.S.C. 1362, the Court distinguished cases involving taxation of Indian tribes from cases involving taxation of Federal instrumentalities. *Id.* at 471

> the federal government lawfully acts, the activities of such corporation are governmental. *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 32; *Graves v. New York ex rel. O'Keefe, supra*, 477.

314 U.S. 102. In sum, the Farm Credit System institutions are not profit-seeking entities. They are fiscal "arms of the government" created to perform a *governmental* function.

### B. The Court Should Not Require That the United States Must be Joined as a Co-Plaintiff

While the United States has suggested that the Court need not decide whether the United States must be a co-plaintiff to avoid the bar of the Tax Injunction Act, one amicus has embraced this rule. *Brief of Amicus Curiae Multistate Tax Commission in Support of Petitioner*, at 6-7. Adoption of this rule would make the Executive Branch a gatekeeper in deciding the scope of Congress's grant of waiver from state tax immunity, a task properly reserved to Congress and the courts.

Only the Justice Department can represent the United States in litigation. 28 U.S.C. 516. The Justice Department is part of the Executive branch. 28 U.S.C. 501. The decision of the Justice Department to invoke or refuse to invoke federal court jurisdiction will undoubtedly be influenced by its view of whether Congress has waived immunity.

The decision to waive the tax immunity of Federal instrumentalities is properly reserved to Congress. In *United States v. New Mexico*, 455 U.S. 720, 737-38 (1982), the Court stated:



> If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects contracts in a particular form, or contracts under particular programs. *James v. Dravo Contracting Co.*, 302 U.S., at 161, 58 S.Ct., at 221; *Carson v. Roane-Anderson Co.*, 342 U.S. 232, 234, 72 S.Ct. 257, 258, 96 L.Ed. 257 (1952). And this allocation of responsibility is wholly appropriate, for the political process is "uniquely adapted to accommodating the competing demands" in this area. *Massachusetts v. United States*, 435 U.S. 444, 456, 98 S.Ct. 1153, 1161, 55 L.Ed.2d 403 (1978) (Plurality opinion). See *United States v. City of Detroit*, 355 U.S., at 474, 78 S.Ct., at 478.

Professor Tribe made a similar point in his article, *Intergovernment Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harvard L. Rev. 682 (1976) [hereinafter *Intergovernmental Immunity*]. Reviewing this Court's decisions on tax immunity, he concluded:

> Some federal institution must be entrusted with the responsibility of deciding when to confer immunity and narrow the states' revenue base, and when to deny immunity even to the extent of permitting states to assert coercive power over federal instrumentalities and property. The real question is whether that institution should be Congress or the executive.
>
> As in eleventh amendment analysis, the issue is essentially one of reconciling competing claims of the states and the national government. Congress, because it represents both state and

national interests, is again the most suitable body to make this determination. Viewed from this perspective, the otherwise unilluminating holdings of the Supreme Court can be understood as reserving to Congress the power to adjust the competing fiscal and symbolic claims of federal autonomy and state revenue needs. Where Congress has been silent, the court's decision to make immunity turn on the legal incidence of a tax under a state's own laws avoids both the inherent danger of ad hoc executive determinations, and the serious interference of state law with federal instrumentalities. On the other hand, where Congress has spoken, full effect is given to its determination. Thus, although the Court's implicit doctrine may appear mechanistic and arbitrary, it can be seen as protecting Congress' role as mediator of the allocation of concurrent powers in the federal system, a role for which its structure and constituency eminently suit it.

*Id.* at 711. The decision of the United States to invoke federal court jurisdiction obviously creates no impediment to judicial consideration of a Federal instrumentality's tax immunity. The decision not to invoke such jurisdiction will, however, bar such consideration, at least by the lower federal courts. In addition, the decision by the United States not to invoke federal court jurisdiction may be seen by the state courts as evidence that the particular Federal instrumentality lacks a governmental role, or that the United States is not persuaded of the instrumentality's immunity. These are questions properly left to Congress and the courts.



The United States, through the Justice Department, is certainly entitled to participate in resolving the questions presented in cases such as this. However, this can best be done through the filing of an amicus brief, as the United States has done here, and as it has done in other cases such as *James v. Dravo Contracting Co., supra.*

## III. CONGRESS HAS NOT WAIVED THE PRODUCTION CREDIT ASSOCIATIONS' IMMUNITY FROM STATE TAX

Arkansas and its amici persist in describing the substantive issue in this case as whether Congress has granted the Production Credit Associations an "exemption" from state tax. *Brief for Petitioner*, at 25; *Brief for the United States*, at 24. This formulation of the issue ignores an unbroken line of holdings by this Court, beginning with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that Federal instrumentalities are immune from state tax unless Congress has expressly waived such immunity. Cases which have stated and applied this rule include *Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103 (1923); *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939); and *Department of Employment v. United States*, 385 U.S. 355 (1966). These and other cases are discussed and summarized in Congressional Research Service, *The Constitution of the United States of America, Analysis and Interpretation*, (Library of Congress, 1987), as follows:

> Fiscal institutions chartered by Congress, their shares and their property, are taxable only with the consent of Congress, and only in conformity

> with the restrictions it has attached to its consent.

*Id.* at 935. Prof. Tribe similarly states the rule:

> The supremacy clause implies, that, absent congressional consent, no state may (1) impose upon the United States or its instrumentalities an obligation to pay any tax.

*Intergovernmental Immunity, supra,* at 704. In short, the issue here is whether Congress has waived the Associations' tax immunity, not whether Congress has provided a statutory tax exemption.

### A. 12 U.S.C. 2077 Does Not Waive The Associations' Immunity.

12 U.S.C. 2077 states:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income tax in the hands of the holder.



As the courts below correctly concluded, nothing in this provision even arguably waives the Associations' immunity from state taxation.[13]

Where the statute is unambiguous, this Court ordinarily refuses to look behind the statutory language. As the Court stated in *Burlington Northern R.R. Co. v. Oklahoma Tax Commission,* 481 U.S. 454 (1987):

> Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' " *United States v. James,* 478 U.S. 597, 606 (1986) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980)). Unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete." *Rubin v. United States,* 449 U.S. 424, 430 (1981).

*Id.* at 461. This approach is appropriate in the present case. The understanding that Federal instrumentalities are immune from state tax absent express congressional consent has been an established principle since *McCulloch v. Maryland* and *Osborn v. Bank of United States.* This

---

[13] This provision does not even deal with the immunity of the Associations. It involves the tax status of their bonds and notes. Immunity from tax for these obligations requires an express exemption because they are generally held by private parties. Absent an express exemption, the private parties would be taxable on the bonds. *See Federal Land Bank of St. Paul,* 314 U.S. at 100. By contrast, the Associations are Federal instrumentalities and constitutionally immune from tax.

understanding is properly imputed to Congress in analyzing 12 U.S.C. 2077. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979).

### B. The 1985 Amendment to 12 U.S.C. 2077 is Consistent With an Intention to Revoke the Prior Conditional Waiver of Immunity

Section 205 of the Farm Credit Amendments Act of 1985, 99 Stat. 1703, deleted the last two sentences of 12 U.S.C. 2077. Those sentences had read as follows:

> Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.

Pub. L. No. 92-181, Title II, § 2.17, 85 Stat. 602 (1971) (12 U.S.C.S. 2098 (Law. Ed. 1984)). The deleted sentences contained two separate provisions: an exemption from federal taxation as long as the federal government owned stock in the Associations; and a waiver of immunity from



state taxation which took effect when the government's stock was redeemed.[14]

The United States suggests that the last two sentences of Section 2077 were deleted because all of the government stock in Production Credit Associations had been redeemed by 1968. *Brief for the United States*, at 11-12. This ignores the fact that Congress recognized in 1985 that the federal government would shortly need to make a substantial new investment in the Farm Credit System to shore up its finances. H.R. Rep. No. 425, *supra*, at 14. Discretionary authority was given to the Treasury to make such an investment in 1985. *Id.* at 15. Ultimately, up to $4,000,000,000 was committed for that purpose. Pub. L. No. 100-233, § 201, 101 Stat. 1597 (12 U.S.C. 2278b-6).

Congress originally provided that the Associations' immunity from state tax would be waived only when the federal government's investment in the Associations was retired. A congressional decision to eliminate the existing waiver of immunity would certainly be consistent with the expectation of renewed federal investment in the System, including indirect investment in Associations through the Capital Corporation.

---

[14] Exemption from *federal* taxation does not derive from the Constitution. It must be explicitly provided by Congress. Thus, the United States' suggestion that the Associations may claim an exemption from federal taxation as the result of the amendment to Section 2077 is incorrect. *Brief for the United States*, at 27. Similarly, the amendment did not make the Associations' property exempt from tax. Constitutional immunity has never extended to property taxes. *McCulloch*, 17 U.S. at 436.

Arkansas contends that the amendment to Section 2077 was merely a technical correction to delete a reference to the "Governor of the Farm Credit Administration", a position eliminated by the 1985 Act. *Brief of Petitioner*, at 28. Arkansas is in error.

The amendment to Section 2077 was intended to reflect the redirection of federal investment from separate investments in individual System institutions to a single investment in the Capital Corporation. Congress explained:

> This section also contains amendments which conform specific sections of the Act to the change made by the merger of the revolving funds and the elimination of the authority to make separate investments in individual institutions. As amended by the Act, the Farm Credit Administration may only make investments from the Section 4.0 revolving fund in the Farm Credit System Capital Corporation.

H.R. Rep. 425, *supra*, at 28-29. Because new federal investment was to be made indirectly through the Capital Corporation, the prior conditional waiver of immunity based on direct Federal investment in the Production Credit Associations was no longer an appropriate means of describing Congress's intentions regarding the immunity of the Associations.[15]

---

[15] In the Agricultural Credit Act of 1987, the Capital Corporation was replaced by the Farm Credit System Financial Assistance Corporation and Assistance Board. It is the Financial Assistance Corporation which funneled federal funds to individual institutions. *See* 12 U.S.C. 2278a *et seq.*



Finally, Arkansas and the amici claim that the Production Credit Associations should not be deemed immune from state tax because Congress provides explicit statutory immunity to other Farm Credit System institutions. *See Brief for the United States*, at 27-29. Arkansas and amici overlook the fact that when Congress intends to waive the immunity of System institutions, it also does so with explicit language. For example, 12 U.S.C. 2211 authorizes Farm Credit System banks to organize "service corporations." Each service corporation is a "federally chartered body corporate and an instrumentality of the United States." *Id.*

In 12 U.S.C. 2214, Congress waived the state tax immunity of service corporations, except for franchise taxes. Section 2214 states:

> That to the extent that sections 2023, 2098, and 2134 of this title may exempt banks or associations of the Farm Credit System from taxation, such exemptions, other than with respect to franchise taxes, shall not extend to corporations organized pursuant to this part.

Congress has been explicit when it intends to waive immunity. Thus, the statutory immunity provided other System institutions cannot be viewed as evidence that Congress intended to waive the immunity of the Production Credit Associations.

Nothing in 12 U.S.C. 2077 waives the Associations' immunity. Nothing in the history of the adoption of the Farm Credit Act of 1985 is inconsistent with a congressional intention to delete the previously existing waiver of immunity. Indeed, the fact that Congress amended 12 U.S.C. 2077 at a time when it was authorizing a reinfusion

of federal investment into the System is fully consistent with an intention to delete the previously existing waiver of immunity.

## CONCLUSION

This Court should conclude that the district court properly exercised jurisdiction in this case. This Court should also conclude the district court and the Court of Appeals for the Eighth Circuit properly held that the Production Credit Associations are immune from Arkansas income, sales, and use tax.

Respectfully submitted,

RUFUS E. WOLFF
*Counsel of Record*
NICHOLAS, WOLFF, LEDBETTER
& CAMPBELL, P.A.
1014 West Third
Little Rock, Arkansas 72201
(501) 372-5659

RICHARD A. HANSON
KEVIN J. FEELEY
MICHAEL R. FAYHEE
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606-5096
(312) 984-7799

*Attorneys for Respondents*

I authorize the filing of this Brief,
if such authorization is required.

/s/ Walter Dellinger
Walter Dellinger
Acting Solicitor General